

In the Matter of D.E. and the Michigan City)
Area School Corporation) **Article 7 Hearing No. 990-97**
)

The school corporation and the parents both requested a due process hearing. Because the school's request for hearing was received before the parents' request for hearing, the school corporation was designated the Petitioner while the parents were designated Respondents. After submitting their request for hearing, the parents also submitted a number of complaint issues which were referred to the Independent Hearing Officer (IHO). The IHO advised the parties that at the conclusion of the hearing he would rule on those complaint issues which were related to the issues in the due process hearing and for which he had the information to make a determination. If it was determined that the issues were not related to the due process hearing issues and he did not have sufficient information to make a determination, those complaint issues would be forwarded to the Indiana Department of Education (IDOE), Division of Special Education, for investigation and action needed. On appeal, the parents challenge several of the Independent Hearing Officer's (IHO) findings of fact or conclusions of law and raise allegations of due process violations.

PROCEDURAL HISTORY OF THE DUE PROCESS HEARING

The school corporation requested a due process hearing to resolve a dispute which arose within the case conference committee regarding the appropriateness of the home to school communications system to be utilized as well as the appropriateness of the most recent Individualized Education Program (IEP). The school's request for a hearing was received by the IDOE by facsimile transmission on September 3, 1997. On September 9, 1997, the IDOE received a request for a hearing from the parents. The parents requested the hearing due to the inability to reach agreement with the school on an appropriate IEP that is least restrictive for the student.

Subsequent to the request for the hearing, the parents submitted a complaint to the IDOE on September 22, 1997. In remanding the complaint to the IHO, the IDOE included a copy of the report of the most recent program review (6/97) of the "Instructional Curricula & Materials, Equipment, and Assistive Devices" (511 IAC 7-6-5) of the school. The IHO considered this instructive information for the IHO and not evidence presented by the parties. The specific complaints were:

1. 511 IAC 7-6-5, section a:

We suspect that the [school] corporation does not have a written, basic sequential program of instruction or curriculum for full-time special education programs that specifies by age or level the awareness, knowledge, and skills to be addressed.

2. 511 IAC 7-6-5, section b:

The [school] corporation is not providing to students with disabilities instructional materials comparable to those provided to non-disabled peers. Though we suspect that problems exist (especially in the “self-contained classes”) at all levels, at the secondary level, in some classes, books do not exist. Children get sheets copied from a copier - **yet, parents are being charged for “book[s]” on the itemized book rental bill** [original bold].

An initial prehearing conference was convened on September 11, 1997. During six hours, the parties were unable to frame the issues for hearing and the conference was continued. The parties joined in a motion to extend the timeline for the hearing. The request was granted to and including December 8, 1997. A second prehearing conference was convened on September 23, 1997, which lasted about five hours and resulted in the identification of eight issues for hearing:

1. For the student’s math, is the proposed placement in the cross-categorical classroom appropriate?
2. For the student’s math, is placement in an MiMH classroom appropriate?
3. Is the student’s instruction for language arts in a homebound setting defined as outside of the regular school day appropriate?
4. Is it appropriate for each of the student’s teachers or their designees to provide a daily tape recorded summary of each class period to be sent home to the parents instead of the proposed written communication system in the proposed IEP?
5. Is it appropriate for the implementation of the IEP that the teacher be ordered to listen to tape recorded messages from the parent instead of the written communication method in the proposed IEP?
6. Is it appropriate for the socialization goals in the proposed IEP to be implemented by a licensed teacher for students with moderate mental handicaps (MoMH)?
7. Is it appropriate, prior to implementation of the IEP, for the parent to provide training to the student’s teachers in math, socialization, and two periods of language arts up to a maximum of one period in each class for five days per week for three weeks, which will consist of the mother translating the student’s language for the teacher during classroom instruction?
8. Is it appropriate for the student to receive one period per day of speech services to implement the agreed upon current goal and need on page 16 of the proposed IEP? (Speech services means 1:1 services by a speech language therapist in a manner as he or

she deems appropriate.)¹

A second request for an extension was requested by the parents during a conference call on October 29, 1997. The request was granted on November 5, 1997, to and including January 5, 1998. On November 22, the parents also submitted a list of five (5) complaints directly to the IHO, which included:

1. Article 7 Considerations, which references the Office for Civil Rights, U.S. Dept. of Education (Letters of Finding, Compliance Reviews, Policy Determinations), under **Complaint No. 1036-96**, states:

“Video-taping is an evaluation when used selectively with a student as a means of demonstrating behavior. The video-tape, under such circumstances, is a part of the student’s educational record.”

With our permission, the school district’s Autism Team video-taped our child in various schools settings to document and demonstrate his “autistic-type behaviors.” They wanted to use this tape to go around the region and give presentations to other school districts, etc., about autism. We let them know that we wanted to see the finished product before they began to show it around the region.

We heard nothing from them until we received a form asking for our permission to show the tape in another region of the state. We again stated that we wanted to see the tape first and we therefore did not sign their form granting permission to show the tape.

We believe that this tape has been shown without our permission. When we first asked to view the tape a couple of years ago, we were told that because other children were on it, we could only see an edited version of it (only the sections where our child was on the tape.) We let them know that they must have gotten these other people’s permission to show this tape, as they had already shown it, so there should be no problem with our seeing it-in its entirety, so that I could see “**in what context**” our child’s sections were shown. In response to our repeated requests to view the tape, we were informed at the beginning of this school year that they decided to destroy the tape in the spring of this year.

Our contention is that they had no authority to show this tape without our permission, and no right to destroy it-as it was part of his educational record.

2. The proposed IEP for this year had our son scheduled to go into a self-contained special education science and social studies class and yet, no IEP was written for these courses. We were told by the director of special education and the school system’s attorney that since these were not “skilled subjects” (i.e., math, and reading), that no IEP needs to be written.
3. This year’s proposed IEP has nothing written for the general education classes our son attends, specifying what modifications in curriculum, instructional methodologies, staffing patterns, classroom organization or any special materials, equipment or instructional aids are needed (511 IAC 7-14-1). This has been going on for the last 5 years.

¹The sentence in parentheses was added after a request for clarification from the school and a resulting conference call on October 19, 1997.

4. This year's proposed IEP had provisions for the teacher-of-record and the paraprofessional to be trained by myself [mother]. We outlined that the nature of the training for the teacher-of-record would consist of assisting her in understanding the uniqueness of our son's communication and socialization. However, once school started, it was apparent that training would not be allowed, and I was told by the teacher-of-record that if I came into the class, I was to just sit in the back of the room and observe.
5. At the IEP conference for this year, when we tried to have input about our son's socialization program, we were told that our input involved "methodology" and that we were not allowed to include "methodology" in the IEP, or even discuss it. At case conferences, only goals and objectives could be discussed-methodology is left up to the individual teacher.

The IHO indicated that if he could not rule on these complaints based upon the evidence and testimony presented at the hearing, they would be forwarded to the Division of Special Education for investigation.

The school requested and was granted permission to depose the student's mother, with questions to be confined to the remedies sought by the parent. A date for the exchange of witness lists was established for October 17, 1997 and the exchange of exhibits for October 30, 1997. Both parties made written discovery requests, and the parties were ordered to comply with the requests for discovery by October 27, 1997. Due to the request for extension of time made by the parents, the date for the exchange of exhibits was extended to November 10, 1997. The parents had requested the tape recordings of specific case conferences to be transcribed by the school. The IHO ordered the transcription of a conference of August 5, 1997, which was provided by the school. The parents found the transcript to be of limited value, as it failed to identify the speakers. The school also requested transcripts from the parents. The parents indicated that no such transcriptions existed. When the evidence was exchanged on October 30, 1997, some transcriptions were included. The school objected to this inclusion of the parents' Exhibit R10-16 because this exhibit was not produced by October 27 pursuant to the IHO's order for compliance with discovery requests. A note in the parents' exhibits indicated that some tapes may be introduced into evidence. The school objected to this note on November 14, 1997, and no tapes were permitted into evidence by the IHO.

During the prehearing conference of September 11, 1997, the IHO determined the "stay-put" placement of the student to be the current proposed IEP. The student was also given two (2) hours per week of individual homebound instruction, and the teacher was to provide a daily written summary of progress in academic subject areas. On September 5, 1997, the parents removed the student from his class where his academic subjects were taught, expressing dissatisfaction with the instruction. The student was maintained in non-academic subjects, which included a "careers" class required of all students. This class ended after nine weeks. The parents wished the student not to repeat the class and removed him and he was enrolled in an art class. By letter of November 10, 1997, the IHO approved the change.

A prehearing conference was convened on the first day of the hearing. The school raised objections to parents' Exhibits R8-1 through R8-8, except R8-7, and R10-10. These exhibits related to excerpts from professional training manuals, books, etc. The IHO deferred ruling until the end of the hearing. Because the exhibits were referred to during the hearing, the exhibits

were admitted into evidence. All other exhibits (with the exception of R10-16 and R10-19, previously excluded) were admitted. The curriculum vitae of a witness who testified by telephone on behalf of the student was also admitted into evidence as Exhibit R-11. At the conclusion of the testimony, the parties were given the option of giving oral closing arguments or submitting them in writing. Both parties chose to submit them in writing, and each party was given until December 10, 1997 at 5:00 to submit written closing arguments.

The IHO issued his written decision on January 9, 1998. The IHO determined the student to be 15 years old and in the 8th grade with a primary disability of autism and a secondary disability of communication disorder. The student has significant communication problems with severe delays in language and expressive language and needs to be taught using visual prompts. He has made gains in his language skills, and a consultation report from the Indiana University Institute for the Study of Developmental Disabilities in 1994 indicated that his communication skills were improving. Recommendations included more inclusion with peers rather than with younger children. Emphasis was placed on increasing interactions with peers and improving socialization. The student was recognized as honorable mention for the honor roll in 1992-93 and has shown the ability to earn "A" and "B" grades in his classes. He also earned recognition on the honor roll in January, 1997.

The student's triennial evaluation was completed in March, 1997. This report indicated that the student's intellectual functioning is in the mildly mentally handicapped range with better skills in nonverbal than in verbal skills. He shows a delay in visual-motor skills. His academic achievement level and adaptive behavior are consistent with his intellectual functioning. An index of autistic behavior indicated significant problems with extreme aloneness, non-communicative language, perceptual disturbances, and cognitive and motor distortions. Math was shown to be an area of strength.

During the 1992-93 school year the use of tape recorded messages between the parents and the paraprofessional began and was in full use in the 1993-94 school year. Tape recorded messages continued until the 1996-97 school year when the Director of Special Education asked that it stop. The Director was concerned about confidentiality and that the teacher of record (TOR) was not aware of the contents of the tape. Transcription of the tapes could not be done in an efficient manner. The parents felt that taping was more convenient and faster than writing or typing communications between home and school. Instead of using tapes, the school proposed to use home-school communication logs that it felt were effective, appropriate and consistent with the goals and objectives of the IEP.

The school recommended placement for the student in the 8th grade at a corporation junior high school with instruction given in special education classes for most of the day and general education with support for the remainder of the day for the 1997-1998 school year. The student attended a middle school during the 1996-1997 school year and was promoted to the junior high school for 1997-1998.

The school has an autism training team designed to assist teaching staff to work with students with autism. Members of this team have received extensive training in autism and have provided training to teachers about the student since 1995. Before the start of the 1997-98 school year, the autism team provided about three hours of training about autism to all teachers, followed by discussions of the student's specific needs. Further training was provided on October 27 and November 22, 1997. The student's TOR attended at least four of the five training sessions.

The school has cross-categorical classrooms at the secondary level, where children are placed based upon their needs and not their diagnostic/eligibility labels. There are no specific classrooms designated "mildly mentally handicapped" (MiMH) at the secondary level. For the current year, the student was placed in a classroom with a teacher who provided instruction in math, language arts and social studies and was designated as his TOR. The TOR is properly licensed and trained in the area of learning disabilities and emotional handicaps. The maximum number of students in the class at any one time ranged from seven to eleven students. In addition, the student has a paraprofessional with him all day to assist with communication and keeping assignments. This paraprofessional has been with the student since 1996.

The student's proposed IEP contains goals for socialization, communication, language and mathematics. The school proposed to provide instruction in a cross-categorical classroom for language arts, socialization and math. The school believes the student's IEP can be appropriately implemented and that the teacher conducted instruction appropriately. The parents made requests for specific teachers for the student's language arts, math and socialization goals.

An integrated model is used for the student's speech and language communication in which primary emphasis is placed on the natural classroom environment rather than a one to one method. The language intervention strategy is based upon a model presented by the parents which was adopted for use with the student. When the student was removed from his academic courses in September, the speech pathologist provided the student's services individually. The speech pathologist indicated that the student's general education teachers were generally able to understand the student and did not need the student's mother in the classroom to provide translation for him. Daily speech therapy of one hour per day is not appropriate for the student.

The student's previous speech pathologist had worked with the student twice per week for 45 minutes each, but preferred that the services be provided in a special education language arts classroom as learning language comprehension is best done in a natural setting. A consultation model of language training enables the speech pathologist to work with the teachers and also to transfer direct work with the student to the classroom.

The teachers and staff working with the student had little difficulty communicating with the student after they began to know him and could make adaptations in questions. The student is not disruptive in the classroom. The student's aide was helpful and effective in assisting in communication. The student's parents have been very proactive in the student's education and made significant contributions. The parents are perceived as welcome and needed partners in planning and implementing the student's educational program.

Based upon the foregoing findings of fact, the IHO entered conclusions of law addressing the seven complaint issues and eight issues submitted for the hearing. The IHO concluded that based upon the evidence and testimony, and the copy of the report of evaluation of the curriculum provided by the Indiana Department of Education, the school is in compliance with 511 IAC 7-6-5 as to having a written, basic sequential program of instruction or curriculum for full-time special education programs and providing instructional materials comparable to those provided to non-disabled peers.

The IHO determined that the complaint issues concerning the video tape of the student and the lack of an IEP for special education science and social studies were not addressed at the hearing. The complaint issue concerning the lack of the IEP specifying modifications in curriculum, instructional methodologies, staffing patterns, classroom organization or special materials, equipment or instructional aids were not addressed at the hearing. The Department of Education was directed to investigate these complaints. The remainder of the complaint issues were addressed within the context of the hearing issues.

“Cross categorical programming, or the provision of services by a given special education teacher to students with different disabilities at the same time, is permitted in any of the placement options provided the requirements set forth in 511 IAC 7-12-2 are met” (511 IAC 6-14-1(g)). Cross categorical programming for the student is appropriately conducted in the school and the school is complying with the requirements of 511 IAC 7-12-2. The student is appropriately placed in the least restrictive environment for his math instruction. The school does not have separate classrooms for students identified as having a Mild Mental Handicap (MiMH). Article 7 does not require that schools provide separate classrooms for students with specific disabilities, only that the program for a student must be appropriate.

The proposed placement for language arts instruction in the cross categorical classroom is appropriate. To provide all language arts instruction outside of the classroom in a homebound setting is determined to be excessively restrictive and not appropriate for the student. The proposed program is intended to improve the student's academic, social, and communication functioning in an integrated setting.

While the use of tape recordings between home and school have been useful aids in communication with parents, the use of tape recordings would necessitate extensive monitoring to translate them into written form. Maintaining such records would be extremely difficult to assure that all information would be available when needed and could interfere with programming for the student. Tape recorded messages also present a concern about maintaining confidentiality. The proposed written communication has been used successfully without evidence of compromising the student's program. The use of written communication logs is considered appropriate (511 IAC 7-12-1), and is appropriate for maintaining the student's records (511 IAC 7-8-1). It is not appropriate for each of the student's teachers to provide daily tape recorded messages of each class period, nor is it appropriate for the teacher to be ordered to

listen to tape recorded messages from the parent instead of the proposed written communication method.

The student's teachers are appropriately licensed, per 511 IAC 7-14-1. Under 511 IAC 7-14-1(g), cross-categorical programming is permitted. The teaching staff has been trained in autism and has consultation services continually available, which is required under 511 IAC 7-11-1(e). It is appropriate that a teacher licensed as a teacher of students with Moderate Mental Handicap could implement the student's socialization goals.

The student's teachers have been provided with training and do not have undue concerns about being able to communicate with the student or implementing his IEP. The IEP can be implemented by the school and it is neither necessary nor appropriate for the parents to be in the classroom to translate the student's language for one period per class for five days per week for three weeks. A parent may provide input into an educational program, but may not dictate how instruction is to be provided. The school does have authority to provide instruction and to determine specific methodologies for instruction.

An integrative model of communication is better than intensive individualized services for the student, and is consistent with the goal and need specified in the IEP. Taking time away from instruction in the classroom is inappropriate for the student and could interfere with his progress. The student continues to receive direct speech and language services for an hour per week, plus consultation with the teaching staff. This method of implementation of the goal and need in the IEP is appropriate and consistent with 511 IAC 7-14-1. Providing 1:1 speech services for one hour per day is not appropriate.

Based upon the foregoing findings of fact and conclusions of law, the IHO issued the following specific orders:

1. The school is ordered to implement the proposed IEP in its entirety using teaching staff that it deems appropriate for the student. This ORDER in no way restricts the rights of the parents to participate in the education of the student. In fact, the IHO strongly encourages the school and the parents to continue working together in what has been a mutually beneficial relationship over the years that has clearly been of benefit to the student.
2. The school is ordered to immediately discontinue the current practice of two hours of homebound instruction per week for language arts as provided in the "stay-put" order during the pendency of these proceedings. All instruction is to be provided as presented in the proposed IEP.
3. The school is to convene a conference with the parents so that they may discuss which teachers and classrooms the student will be assigned, with the understanding that the school has final authority in this matter. The school may, however, grant the requests of the parents if the requests are appropriate and consistent with Article 7 and this decision.
4. The school is to provide access to the school, classroom, teachers, etc., in a manner consistent with such access that would be provided to all students.

5. The Indiana Department of Education is to investigate Complaints #3, #4, and #5 as indicated above.
6. In the Closing Argument submitted by the Petitioner, counsel for the school asked the IHO to retain jurisdiction of this matter for at least twelve (12) months in order "...to help facilitate the necessary ongoing cooperation between the parties" (p.11). The IHO interprets this request as the school having confidence in his ability to serve in this role, and is appreciative. However, state and federal guidelines direct that an IHO's jurisdiction is effective for thirty (30) days after issuing a decision or until an appeal is filed by either party. Therefore, the IHO has no authority to grant such a request.
7. These ORDERS are to be implemented within (30) days unless appealed by one of the parties.

The IHO advised the parties of their right to appeal and the timelines for doing so.

PROCEDURAL HISTORY OF THE APPEAL

On January 20, 1998, the parents timely requested an extension of time in which to file their petition for review. The Board of Special Education Appeals (BSEA) granted this request on January 21, 1998, giving the parents until February 6, 1998, to file their appeal. An amended order was issued by the BSEA on January 26, 1998, which extended the time to file the petition for review until February 26, 1998. On February 2, 1998, the school requested an extension of time to respond to the petition for review. The school was granted an extension until March 27, 1998, in which to file its response to the parents' petition for review, and the timeline for reviewing the record and issuing a written decision was extended until April 17, 1998. The parents timely filed their Petition for Review on February 26, 1998. The school's Response to Parents' Petition for Review was timely filed on March 26, 1998. The parties were notified that the BSEA would conduct its impartial review, with oral argument, on April 9, 1998.

Parents' Petition for Review

In their Petition for Review, the parents have claimed due process violations concerning the exclusion of evidence (transcripts and tape recordings of case conference meetings), taking the deposition of the parent, taking witnesses out of order and the procedures used in the framing of the issues. The parents have also objected to the following findings of fact and conclusions of law:

Findings of Fact

The parents object to F.F. No. 23, which indicates that the autism team has provided training to teachers. Specifically the parents object to the part of the finding indicating the TOR attended four out of five training sessions as the TOR testified that he did not receive any training. The parents object to F.F. No. 14's characterization of the parents believing the taped messages to be more "convenient" rather than "necessary."

Finding of Fact No. 15 states: "An expert witness also testified that taping is easier and provides a method for 'keeping up to snuff' more easily, and especially if there are many students and extended written notes or logs are used with them. If a tape were to come in late to class, however, and there is not enough time to listen to it, communication could be less." The parents argue this finding was taken out of context. The parents also object to F.F. No. 13 as being incomplete and F.F. Nos. 13, 16, 17 and 18 as being speculative. These findings all pertain to various problems noted by the school associated with the use of tape recorded messages between the school and parents and include issues of confidentiality and lack of time for school personnel to listen to the tapes before the start of the school day.

The parents object to the IHO's reliance on the testimony of a witness whom the parents believe to have presented fraudulent credentials (F.F. No. 34). The parents also object to F.F. Nos. 6, 10 and 11, claiming these findings are based upon the student's grades rather than his performance and that the evidence shows that for the past five years the student has been repeating the same skills that he has already mastered (multiplication) rather than moving on to division.

Conclusions of Law

In C.L. No. 4 and No. 5, the IHO determined that the school did not violate 511 IAC 7-6-5 (due to lack of curriculum or instructional materials). These conclusions were based in part (C.L. No. 4) and entirely (C.L. No. 5) upon a report provided by the Indiana Department of Education. The parents argue that the report was not evidence and should not have been relied upon by the IHO. The parents also assert that Conclusion of Law No. 4 is not supported by substantial evidence and argue that the evidence in fact contradicts the conclusion of the IHO.

In C.L. No. 6 and No. 7, the IHO determined that the complaint issues concerning the use and destruction of the video tape and the lack of an IEP for self-contained special education classes were not addressed in the hearing and directed the Indiana Department of Education to investigate the issue. The parents argue that the record of the hearing shows that the IHO was aware that the school no longer had the video tape and there was substantial discussion concerning the lack of IEP goals for the self-contained special education classes.

The parents have also objected to C.L. Nos. 9 and No. 10 which involve two complaint issues concerning provisions for the TOR and aide to be trained by the student's mother and parental input about the student's socialization program. The IHO incorporated his conclusions on these issues into the conclusions of law for the hearing issues, generally concluding that the school's staff has had appropriate training and receives ongoing training, and that while parents can have input into methodology, methodology decisions are left to the school's discretion. The parents maintain that the IHO failed to address the complainable issues that the school refused to allow them input to discuss methodology and refused to implement parental training of staff to

which the school had already agreed in the student's IEP.

School's Response

In its Response to Parents' Petition for Review, the school responds to each of the parents' allegations. The school maintains that there were no due process violations. The concerns of using transcripts and tape recordings of case conferences was mischaracterized by the parents and was not relevant to the eight hearing issues. Taking the deposition of a party is permitted by I.C. 4-21.5-3-22 and such deposition was limited by the IHO. Two witnesses were taken out of order. Both of these were witnesses for the parents and their testimony was taken out of order for the convenience of the witnesses. There was no prejudice to the parents. Finally, there was no violation in the procedures for framing the issues.

The school maintains that all of the findings of fact are supported by substantial evidence and testimony in the record. The conclusions of law are supported by the findings of fact and the law. As to C.L. No. 4 and No. 5, the IHO's decision was not based entirely upon the Program Review submitted by the IDOE, but also by F.F. No. 30 and Exhibits P9-P12. Also, the school argues that the IHO had the authority to take notice of the Program Review pursuant to I.C. 4-21.5-3-27(d). The school argues that the IHO's decision should be upheld in its entirety.

REVIEW BY THE BOARD OF SPECIAL EDUCATION APPEALS

The Indiana Board of Special Education Appeals met on April 9, 1998, for oral argument and to conduct its review of the above-referenced matter. All members were present and had reviewed the record, the Petition for Review and Response. The parents and student were present and represented by legal counsel. The school was represented by its director of special education and by legal counsel. Both parties presented oral argument and rebuttal. The Indiana Board of Special Education Appeals now finds as follows:

Combined Findings of Fact and Conclusions of Law

1. The Indiana Board of Special Education Appeals (BSEA) has jurisdiction in the matter pursuant to 511 IAC 7-15-6.
2. While the due process hearing was pending, the parents filed a letter of complaint regarding two issues with the IDOE, Division of Special Education (DSE).
3. The DSE referred the two complaint issues to the IHO for his determination as to whether these issues were related to the hearing issues. The DSE also provided the IHO with a copy of its most recent program review (6/97) of the "Instructional Curricula & Materials, Equipment, and Assistive Devices" (511 IAC 7-6-5) (hereinafter "Program Review") of the school.
4. The IHO did not consider the Program Review as evidence, nor did he take official notice of the Program Review pursuant to I.C. 4-21.5-3-26(f) & (g).
5. The parents subsequently submitted five additional complaint issues directly to the IHO.
6. The IHO did not make an initial determination as to whether the seven complaint issues were

related to the hearing issues, nor did he add them as additional issues for the hearing. As a result, the parents were prohibited from presenting testimony addressing complaint issues which were not related to the hearing issues.

7. During the pendency of the due process proceedings, the DSE did not have the authority to investigate the complaint issues, thereby precluding it from complying with requirements of 511 IAC 7-15-4 and 34 CFR §§ 300.660-300.662.²

8. The IHO erred in relying upon the Program Review, which was neither evidence nor a document which had been officially noticed, in concluding there was no violation of 511 IAC 7-6-5(a) & (b) concerning a basic sequential program of instruction or curriculum and the provision of instructional materials comparable to those provided to non-disabled peers. The IHO's C.L. Nos. 4 and 5 are therefore deleted and Complaint Issues 1 and 2 are to be forwarded to the IDOE for investigation.

9. Complaint issues unrelated to the eight issues identified for the hearing should either have been added as issues for the hearing or promptly forwarded to the IDOE for timely investigation. The IHO's C.L. Nos. 6, 7 and 8 are therefore deleted and Complaint Issues 3, 4 and 5 are to be forwarded to the IDOE for investigation.

10. Evidence and testimony support the IHO's F.F. Nos. 6, 10, 11, 13, 15, 16, 17, 18 and 23. These Findings of Fact are upheld as written.

11. The mother's testimony indicated she believed that the tape recorded home-school communication was necessary.

12. Hearing issue number 7 stated:

Is it appropriate, prior to implementation of the IEP, for the parent to provide training to the student's teachers in math, socialization, and two periods of language arts up to a

²An SEA cannot investigate a complaint issue that is also pending before an IHO. OSEP Memorandum 94-16, 21 IDELR 85 (OSEP, 1994); Letter to Ash, 23 IDELR 647 (OSEP 1995). In its 1994 Memorandum, OSEP stated:

In some cases, a written complaint may be received that is also the subject of a due process hearing, or may contain multiple issues, of which one or more may be part of that hearing. In those cases, the State must set aside any part of the complaint that is being addressed in the due process hearing, until the conclusion of the hearing.

However, any issue in the complaint that is not a part of the due process action must be resolved within the 60 calendar day timeline using the SEA's complaint management procedures. 21 IDELR at 86.

In the current case, the DSE received two complaint issues while a due process hearing was pending. These two complaint issues were referred to the IHO for his determination as to whether they were related to the hearing issues. If they were not, and the IHO was not assuming jurisdiction over the issues, the issues should have been sent back to the DSE for timely investigation. At the direction of the IHO, additional complaint issues from the parents were submitted directly to the IHO rather than to the DSE. The IHO made no determination until after the hearing as to whether the seven complaint issues were related to the hearing.

maximum of one period in each class for five days per week for three weeks, which will consist of the mother translating the student's language for the teacher during classroom instruction?

The issue submitted by the parents was:

Are teachers and support staff adequately trained to implement the IEP goals?

- A. Training is needed in both the teaching technique and his unique communication style and vocabulary to enable him to comprehend instruction and be understood by others-- essential components to his benefitting from a FAPE. This training needs to extend into the classroom setting and parents need to be included in the training process.

The IHO's framing of hearing issue number 7 was unduly restrictive of the issue raised by the parents and improperly limited the remedies available to the IHO.

13. Evidence and testimony support the value of translation training by the parent.

14. Conclusion of Law No. 18³ is based in part on speculation and supposition and not on the testimony and evidence. The BSEA hereby strikes C.L. No. 18 in its entirety and replaces it with the following:

The evidence and testimony clearly indicate that the parents are knowledgeable about their son and his educational needs. Further, it is clear that the parents have much to offer the school in knowledge about their son, and have been most helpful in communications with the school for the last several years. Article 7, Rules 3 - 14 clearly indicate that the school is responsible for developing and implementing an appropriate educational program. A parent may provide input into an educational program, but may not dictate how instruction is to be provided. Parents may not compel a school district to provide a specific program or employ a specific methodology. The student has a paraprofessional with whom the parents can work, and the teachers remain available to work with the parents. However, evidence and testimony in this hearing indicate that, although the teachers have been provided with training and do not have undue concerns about being able to communicate with the student or implementing his IEP, training in translation by the parents at the beginning of school terms has been beneficial both to the student and the teachers. Incorporated herein is reference to Complaints 6 and 7 listed earlier. However, this issue as written is so narrowly defined that the substance of the issue and related complaints could not be properly addressed if confined to the times stipulated. Therefore, since evidence and testimony support the benefit to be received from the parents in translation training, the BSEA determines that the parent will provide translation training at the beginning of school terms and any other times as determined by a case conference committee. This training will be provided in the classroom under the direction of the teacher or off-site.

15. The school's expert witness was called upon to testify as to the appropriateness of the teacher's classroom instruction and methodology. Expert witnesses must possess specialized education, training or experience. "If scientific, technical, or other specialized knowledge will

³Conclusion of Law No. 18 specifically relates to hearing issue number 7.

assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” Indiana Rules of Evidence, Rule 702(a). While the technical rules of evidence are not strictly followed in administrative proceedings, there must still be some foundation for expert opinion. The evidence and testimony failed to disclose any education, training or experience to qualify this individual to testify as to such matters.⁴

16. Discovery orders and the admission of exhibits are within the discretion of the IHO. The record fails to indicate any prejudice to the parents or any abuse of discretion by the IHO in his rulings concerning the admission of exhibits or the deposition of the parent.

17. The parents have raised due process concerns regarding the order of witnesses, the conflicting testimony of witnesses and the IHO’s alleged disregard of substantial and reliable evidence. The only witnesses called out of order were two witnesses testifying on behalf of the parents. These witnesses were called out of order to accommodate the schedules of the witnesses. Resolving matters of conflicting testimony and the weight to be given to testimony and evidence is within the discretion of the IHO. No prejudice to the parents or abuse of the IHO’s discretion has been shown.

All votes by the BSEA regarding the above were voice votes and were unanimous.

⁴The individual in question is not a licensed educator or psychologist. The BSEA has failed to find any authority indicating state licensure in the three areas for which he claims to hold a license. For example, he claims to be licensed as a “qualified mental retardation professional,” or “QMRP.” No state licensure for a QMRP is indicated under state law. A QMRP is defined at 410 IAC 16.2-1-32, and means a person who has specialized training or one (1) year of experience in treating the mentally retarded, and is one of the following: (a) a psychologist with a master’s degree from an accredited program; (b) a licensed doctor of medicine or osteopathy; (c) an educator with a degree in education from an accredited program; (d) a social worker with a bachelor’s or master’s degree in social work or a bachelor’s or master’s degree in a field other than social work and at least three (3) years of social work experience under the supervision of a qualified social worker; (e) an occupational therapist; (f) a licensed speech pathologist or audiologist; (g) a licensed registered nurse; (h) a therapeutic recreation specialist who is a graduate of an accredited program; (i) a certified rehabilitative counselor; or (j) a licensed physical therapist. Testimony and evidence fail to indicate the individual holds the appropriate certifications or licenses to qualify as a QMRP.

Orders of the Indiana Board of Special Education Appeals

In consideration of the above Combined Findings of Fact and Conclusions of Law, the Indiana Board of Special Education Appeals now holds:

1. Finding of Fact No. 14 is amended to read as follows:
 14. The student's mother testified that the taped messages are necessary and are faster than writing or typing communications between home and school.
2. Finding of Fact No. 34 is amended to read as follows:

Testimony by the Director of Special Education who observed the cross-categorical classroom indicated that she felt the student's IEP could be appropriately implemented and that the teacher conducted instruction appropriately. Also, this person testified that she saw no evidence of behavioral problems in the classroom with any students. (T 610).
3. Finding of Fact No. 45 is added as follows:
 45. Evidence and testimony support the value of translation training by the parent.
4. Finding of Fact No. 46 is added as follows:
 46. The BSEA has determined that the expert witness for the school lacks the proper credentials and his testimony has been disqualified.
5. The IHO's Conclusions of Law Nos. 1, 2 and 3 are upheld as written.
6. Conclusion of Law No. 18 is struck and replaced with a new conclusion of law as indicated in Combined Finding of Fact and Conclusion of Law No. 14.
7. The IHO's Conclusions of Law Nos. 4, 5, 6, 7 and 8 are hereby struck.
8. The Conclusions of Law are hereby renumbered to reflect the removal of C.L. Nos. 4 through 8.
9. The IHO's Orders Nos. 1, 2, 4, 6, and 7 are upheld as written.
10. The IHO's Order No. 3 is amended as follows:

The school is to convene a conference with the parents so that they may discuss which teachers and classrooms the student will be assigned, with the understanding that the school has final authority in this matter. The case conference committee will address the translation training as indicated in C.L. No. 18.
11. Order No. 5 is amended as follows:

The Indiana Department of Education is to investigate Complaints #1, #2, #3, #4 and #5.
12. The parents were not denied due process.
13. All other Motions or objections not specifically addressed herein are hereby deemed denied.

Date: April 17, 1998

/s/ Raymond Quist, Ph.D.
Raymond Quist, Ph.D., Chair
Board of Special Education Appeals

Appeal Right

Any party aggrieved by the written decision of the Indiana Board of Special Education Appeals has thirty (30) calendar days from receipt of this decision to request judicial appeal from a civil court with jurisdiction, as provided by I.C. 4-21.5-5-5 and 511 IAC 7-15-6(p).